IN THE

Supreme Court of the United States

October Term, 1966

No. 105

HARRY KEYISHIAN, GEORGE HOCHFIELD, NEWTON GARVER, RALPH N. MAUD and GEORGE E. STARBUCK,
Appellants,

vs.

THE BOARD OF REGENTS OF THE UNIVERSITY OF THE STATE OF NEW YORK, BOARD OF TRUSTEES OF THE STATE UNIVERSITY OF NEW YORK, STATE UNIVERSITY OF NEW YORK AT BUFFALO, SAMUEL B. GOULD, CLIFFORD C. FURNAS, J. LAWRENCE MURRAY, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE OF THE STATE OF NEW YORK, CIVIL SERVICE COMMISSION OF THE STATE OF NEW YORK, MARY GOODE KRONE, and ALEXANDER A. FALK,
Appellees.

ON DIRECT APPEAL FROM THE FINAL JUDGMENT OF A THREE-JUDGE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF NEW YORK.

BRIEF FOR APPELLEES, BOARD OF REGENTS, ARTHUR LEVITT, DEPARTMENT OF CIVIL SERVICE, CIVIL SERVICE COMMISSION, MARY GOODE KRONE AND ALEXANDER A. FALK

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Preliminary Statement

This brief is submitted on behalf of appellees Board of Regents, Arthur Levitt, Department of Civil Service of the State of New York, the Civil Service Commission, Mary Goode Krone, and Alexander A. Falk, for affirmance of the judgment of a three-judge United States District Court which dismissed the complaint.

State University of New York and the remaining appellees are represented by the State University Counsel who is submitting a separate brief.

The Action

This action, which was brought by five persons employed by the State University of New York at Buffalo challenges the constitutionality of Section 105 of the Civil Service Law of the State of New York, Sections 3021 and 3022 of the Education Law of the State of New York and the Rules of the Board of Regents adopted pursuant thereto.

The complaint asked that the case be referred to a three-judge District Court to hear and determine and that an order be granted restraining the enforcement of said statutes and rules pending the determination of that Court. It also asked that those appellants who had been dismissed or suspended from the State University for non-compliance with the statute and rules be reinstated (Record, pp. 14-15)*.

Hon. JOHN O. HENDERSON, District Judge, denied appellants' motion and dismissed the complaint upon the ground that "in large part the issues raised by the complaint had been laid to rest by the decision of the Supreme Court of the United States in *Adler* v. *Board of Education*, 342 U. S. 485 (1952)" (233 F. Supp. 752 [1964]).

The United States Court of Appeals, Second Circuit, on May 3, 1965, reversed and remanded, with instructions to the District Court to convene a three-judge District Court (345 F. 2d 236 [1965]).

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* All references are to pages in the Record unless otherwise indicated.

A three-judge District Court for the Western District of New York (Hon. LEONARD P. MOORE, United States Circuit Judge, Hon. HAROLD P. BURKE, United States Chief District Judge and Hon. JOHN O. HENDERSON, District Judge) was convened. On January 5, 1966, that Court, by a unanimous decision, found constitutional the statutes, rules and procedures attacked by appellants in this action. The opinion of the Court (written by Circuit Judge MOORE) is reported in 255 F. Supp. 981 and is printed in the Record at pages 278-299.

Statutes Involved

The statutes involved are quoted in full in the appendix to this brief. Set forth below is a brief summary of their provisions and historical development.

a. Statutes and rules at the time of the *Adler* case.

Education Law § 3022. This section was first added to the Education Law in 1949 and is commonly known as the Feinberg Law (L. 1949, c. 360). Its purpose was to eliminate from the State's public school system as teachers, persons who advocate the overthrow of the government by force, violence or any unlawful means. This was to be done by implementing the pre-existing provisions of Civil Service Law § 12-a and Education Law § 3021.

As originally enacted, the first subdivision of Section 3022 directed the Board of Regents to adopt rules and regulations for the disqualification or removal from employment in the public school system of the State of any persons violating the provisions of Civil Service Law § 12-a and Education Law § 3021.

The second subdivision of Section 3022 directed the Board of Regents, after inquiry, notice and hearing, to list organ-

izations which advocate the overthrow of the government by force, violence or other unlawful means, and to provide by rules that membership in any such organization is *prima facie* evidence of disqualification for employment in the school system.

Education Law § 3021. At the time of the enactment of the Feinberg Law, Section 3021 directed the removal of persons employed in the public schools of any city or school district of the State for any treasonable or seditious words or acts.

Civil Service Law § 12-a. At the time of the enactment of the Feinberg Law, Section 12-a of the Civil Service Law disqualified for employment in the civil service of the State or in any school, college or State educational institution any person who advocated the overthrow of the government by force, violence or any unlawful means.

Rules of the Board of Regents. On July 15, 1949, Article XVIII, Section 244 of the Rules of the Board of Regents, entitled "Subversive Activities" was adopted by that Board pursuant to the provisions of the Feinberg Law. These Rules provided procedures to be followed for the disqualification and removal of teachers in the public schools who had violated the provisions of Education Law § 3021 or Civil Service Law § 12-a.

b. The *Adler* case.

Following the enactment of the Feinberg Law, three actions were brought almost simultaneously attacking its constitutionality. All three were the subject of separate opinions in the courts of first instance and in the Appel-Div. 463; *L'Hommedieu et al.* v. *Board of Education,* 276 Div. 463; *L'Hommedieu et al. v. Board of Education,* 276 App. Div. 497; *Lederman* v. *Board of Education,* 276 App.

Div. 527). The cases were argued together and decided as one by the New York Court of Appeals which sustained the constitutionality of the statute (301 N. Y. 476). The Court of Appeals decision was affirmed by this Court in *Lederman* v. *Board of Education*, aff'd sub nom. *Adler* v. *Board of Education*, 342 U. S. 485.

c. Statutory changes subsequent to the *Adler* case.

Education Law § 3022. In 1953, this Section, known as the Feinberg Law, was amended to include within its coverage employees of any college or institution of higher education owned and operated by the State (L. 1953, ch. 681). Although such persons had, since 1939, been disqualified by Civil Service Law Section 12-a for advocating the overthrow of the Government by force, they had not previously been covered by the Feinberg Law. This 1953 Amendment subjected them to the procedures provided for by that law and the implementing Regents Rules.

On September 24, 1953, pursuant to the provisions of Section 3022, the Board of Regents, after extensive hearings, listed the Communist Party of the United States and the Communist Party of the State of New York as subversive organizations.

Civil Service Law § 12-a. In 1958, the Legislature took cognizance of the listing by the Regents of the Communist Party of the United States and the Communist Party of the State of New York by amending Civil Service Law § 12-a to make membership in such organizations *prima facie* evidence of disqualification for any office or position in the service of the State (L. 1958, c. 503).

During that same legislative session, the whole Civil Service Law was revised and recodified (L. 1958, c. 790).

In that recodification, former Section 12-a was transferred without change to Section 105 and became subdivisions 1 and 2 of that new section.

At the same time, former Section 23-a of the Civil Service Law, which related to removal from office for treasonable or seditious acts or utterances, was amended and transferred to subdivision 3 of the new Section 105. Section 23-a is not here involved. It is referred to herein only because it eventually became subdivision 3 of Section 105 and subdivisions 1 and 2 of that section are pertinent to our inquiry.

Thus, Civil Service Law § 105 is presently composed of former Section 12-a which is contained virtually verbatim in subdivisions 1 and 2 and former Section 23-a which is contained in an amended form in subdivision 3. (See Table of Distribution in the Note to chapter 790 of the Laws of 1958). Education Law § 3022 continues to refer only to the original Section 12-a and makes no reference to the recodified Section 105.

Facts

The State University of New York is vested with the responsibility for the operation of all State-owned and operated institutions of higher education in the State of New York (Education Law, Art. 8). Following the enactment of the 1953 amendment to Education Law § 3022, which subjected these institutions to the procedures of that law and the Regents' Rules relating thereto, the State University Board of Trustees established procedures for compliance therewith.

For example, it distributed to all members of its academic staff a copy of the Regents' Rules and the underlying statutes (22). It also adopted a form of certificate (known

as the Feinberg certificate) which every applicant for a position on the academic staff of the University was required to sign before appointment (23). That form stated that the applicant had read the Regents' Rules on Subversive Activities; that he understood that the rules and laws cited therein constituted a part of the terms of his employment; and that he was not now a member of the Communist Party and that if he had ever been he had communicated that fact to the President of the State University (30).

Non-academic personnel seeking an appointment with the University were required to complete a standard civil service form on which one of the questions read as follows (211):

> "Have you ever advised or taught or were you ever a member of any society or group of persons which taught or advocated the doctrine that the Government of the United States or of any political subdivisions thereof should be overthrown or overturned by force, violence, or any unlawful means?"

Prior to 1962, the University of Buffalo was a private educational institution. On September 1, 1962, the University of Buffalo was merged into the State University of New York and since that time has been a State-owned and operated institution of higher education known as the State University of New York at Buffalo (19). As such it became subject to the provisions of Education Law § 3022.

Following the merger, all members of the academic staff of the former University of Buffalo were required to sign a Feinberg certificate. Four of the five appellants—Keyishan, Hochfield, Garver and Maud—were holding term appointments to the academic staff at the time of the merger. When they declined to sign the certificates, they

were notified that upon the expiration of their terms, their appointments would not be renewed upon the ground of insubordination.

The fifth appellant, Starbuck, was a member of the non-academic staff of the University whose temporary appointment was terminated by dismissal when he refused to answer the question on the civil service form quoted above.

Following the commencement of this action, the Board of Trustees of State University revised its procedure for appointments to its academic staff by a resolution adopted May 13, 1965 (276-277). Under the present procedure, the Feinberg certificate is no longer required. The new procedure is as follows (276-277):

> "§ 3. Procedure for appointments.
>
> Before any initial appointment shall hereafter be made to any position certified to be in the professional service of the University pursuant to Section 35 of the Civil Service Law the officer authorized to make such appointment or to make the initial recommendation therefor shall send or give to the prospective appointee a statement prepared by the President concisely explaining the disqualification imposed by Section 105 of the Civil Service Law and by Section 3022 of the Education Law and the Rules of the Board of Regents thereunder, including the presumption of such disqualification by reason of membership in organizations listed by the Board of Regents. Such officer, in addition to due inquiry as to the candidate's record, professional training, experience and personal qualities, shall make or cause to be made such further inquiry as may be needed to satisfy him as to whether or not such candidate is disqualified under the provisions of such statute and rules. Should any question arise in the courts of such inquiry such candidate may request or such officer may require a personal interview. Refusal of a candidate to answer any question

relevant to such inquiry by such officer shall be sufficient ground to refuse to make or recommend appointment. An appointment or recommendation for appointment shall constitute a certification by the appointing or recommending officer that due inquiry has been made and that he finds no reason to believe that the candidate is disqualified for the appointment."

ARGUMENT

POINT I

This Court upheld the constitutionality of the Feinberg Law and related statutes in *Adler* v. *Board of Education*, 342 U. S. 485.

No decision of this Court since *Adler* suggests that the Feinberg Law is other than a reasonable exercise of the power of the State of New York to safeguard the public service from disloyalty.

The constitutionality of the Feinberg Law and related statutes and rules has already been upheld by the Supreme Court of the United States in *Adler* v. *Board of Education*, 342 U. S. 485. Every argument of unconstitutionality which appellants make here was made and rejected by the Court in that case.

Basically, appellants argue that the Feinberg Law and the Rules promulgated thereunder have no valid constitutional objective; that even if the legislative objective is of legitimate State concern, the means selected for accomplishing it unreasonably infringes upon appellants' rights to freedom of speech and assembly and deprives them of due process of law; and that the statute is too broad and vague. Finally, they contend that the law is void as a bill of attainder.

A review of the briefs in the *Adler* case reveals that every challenge which appellants now make to the constitutionality of the Feinberg Law was also made in that case. Appellants argue nothing new.

a. The adoption of measures to safeguard the public service from disloyalty is a valid and constitutional State concern.

The Supreme Court in the *Adler* case, considering the constitutionality of Education Law § 3022, Civil Service Law § 12-a and Regents Rule 244, pointed out that a State has a legitimate interest and concern in preventing the use of its educational system as a platform for urging students to overthrow the government by violent means. In so holding, the Court stated (p. 493):

> "* * * A teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds towards the society in which they live. In this, the state has a vital concern. It must preserve the integrity of the schools. That the school authorities have the right and the duty to screen the officials, teachers, and employees as to their fitness to maintain the integrity of the schools as a part of ordered society, cannot be doubted."

In reaching its decision, the Court pointed out its adherence to its earlier decision in *Garner* v. *Los Angeles Board of Public Works*, 341 U. S. 716 (1951), in which the Court upheld an ordinance of the City of Los Angeles requiring an oath of every person in the City service that he does not "advise, advocate or teach" the overthrow of the government by force, violence or other unlawful means and is not and has not been within the preceding five years a member of any organization which does. There the Court stated (p. 720):

> "We think that a municipal employer is not disabled because it is an agency of the State from in-

> quiring of its employees as to matters that may prove relevant to their fitness and suitability for the public service. Past conduct may well relate to present fitness; past loyalty may have a reasonable relationship to present and future trust. Both are commonly inquired into in determining fitness for both high and low positions in private industry and are not less relevant in public employment."

Appellants, searching for something on which to argue that the *Adler* decision is not controlling, contend that Education Law § 3022, as amended in 1953, now covers academic personnel in universities, and contend that the law might have been proper to protect children from subversive teachers in the public schools, but not college age students. The answer is that Civil Service Law § 12-a (now § 105, subds. 1 and 2), in which this Court found "no constitutional infirmity", applied to college teachers in State educational institutions when it was upheld in the *Adler* case. At that time, § 12-a specifically applied to

> "any person * * * in the public service * * * as * * * teachers * * * in a state normal school or college, or any other state educational institution."

The reference in the *Adler* case to children in the public schools was because that case involved a challenge to the procedures in the Feinberg Law for implementing Civil Service Law § 12-a as it related to employees in the public schools.

Since the constitutional issue is the power of the State to safeguard the public service from disloyalty, there is no difference in whether the teachers are employed in high school or in college. So long as young people are within the educational process, the impact of the teacher and the need that the teacher in a State educational institution be loyal to this country is the same regardless of the level of the educational institution in which the teacher functions.

Significantly, the arguments on behalf of the plaintiffs in the *Adler* case were directed to the restrictions which the statute placed on teachers as teachers, without distinction as to the educational level of those whom they taught.

Moreover, this Court has consistently upheld the right and power of government to protect itself from disloyalty and has adhered to and applied the principles of *Adler* and *Garner* in recent cases:

Beilan v. *Board of Education*, 357 U. S. 399 (1958), quoting the *Adler* decision with approval, upheld the dismissal of a public school teacher who refused to answer questions relating to his Communist affiliations and activities;

Lerner v. *Casey*, 357 U. S. 468 (1958), upheld the discharge of a New York City subway conductor for refusing to answer a question (asked him pursuant to the New York Security Risk Law) as to whether he was a member of the Communist Party;

Nelson v. *County of Los Angeles*, 362 U. S. 1 (1960), also citing the *Adler* decision, upheld the discharge of an employee of a California county for refusing to answer a question of a committee of the United States Congress concerning subversion, as directed by an order of the county board of supervisors pursuant to a provision of the California Government Code;

Konigsberg v. *State Bar of California*, 366 U. S. 36 (1961), upheld the refusal of admission to the State Bar of California of an applicant who had refused to answer questions put to him by the California Committee of Bar Examiners relating to membership in the Communist Party;

In re Anastaplo, 366 U. S. 82 (1961), upheld the refusal of admission to the State Bar of Illinois of an applicant who had refused to answer questions put to him by the Illinois Committee on Character and Fitness, relating to membership in the Communist Party or in allegedly related organizations.

Barenblatt v. *United States,* 360 U. S. 109 (1959), upheld the contempt conviction of a former teaching fellow at the University of Michigan for refusal to answer questions of a congressional committee as to his Communist Party affiliation, on the ground that Congress has a legitimate interest in "inquiring into the extent to which the Communist party has succeeded in infiltrating into our universities * * * persons and groups committed to furthering the objective of overthrow" (p. 129).

Even in *Cramp* v. *Board of Public Instruction,* 368 U. S. 278 (1961), where this Court struck down a Florida statute as being too vague, it did not "question the power of a State to safeguard the public service from disloyalty" (p. 288).

b. The statutes enacted to safeguard the public colleges from disloyalty do not constitute an abridgement of freedom of speech and do not deprive appellants of due process of the law.

Before turning to a consideration of appellants' arguments on this point, it is important to analyze exactly what statutes and rules we are considering and what changes have occurred, if any, since the *Adler* decision.

At the outset it should be remembered that we are dealing only with the *hiring* of personnel at the State University of New York at Buffalo. Our concern is with the steps which the University has taken to comply with the Feinberg Law which prohibits it from employing any person who is

ineligible for appointment "on any of the grounds set forth in section twelve-a of the civil service law." (Education Law § 3022.)

As we have seen, the University, pursuant to that statutory mandate, requires all persons applying for positions on its non-academic staff to complete a civil service form on which he is asked to answer a question whether he has ever advised or taught or been a member of a group which taught or advocated the doctrine that the government of the government of the United States or of any political subdivision should be overthrown by force, violence or any unlawful means.

A person seeking an academic appointment with the University was formerly required to sign a certificate stating that he is not now a member of the Communist Party and that if he ever has been a member, he has communicated that fact to the President of State University. This procedure was recently changed so that now candidates for appointment to academic positions may be questioned concerning any possible ground for disqualification under the Feinberg Law and "refusal of a candidate to answer any question relevant to such inquiry by such officer [the hiring official] shall be sufficient ground to refuse to make or recommend appointment" (277). The candidates for such appointment are no longer required to sign a certificate.

None of the appellants ever qualified for permanent appointment to State University because those seeking academic appointments refused to sign the Feinberg certificates (then required) and the non-academic candidate Starbuck refused to answer the question on his civil service form referred to above.

Thus we are dealing only with the Feinberg Law, the statutes which it specifically implements, the Regents'

Rules and the procedures adopted by the State University to assure itself of compliance therewith in connection with the hiring of its personnel. The separate brief of State University will discuss the procedures established by the University. This brief is devoted to the issue of the constitutionality of the particular statutes under attack.

Specifically, those statutes are Education Law § 3022, which now applies to colleges operated by the State, and Civil Service Law § 105, subds. 1 and 2 (former § 12-a). No other statutes are involved in the action taken by State University.

Appellants seeks to obfuscate the real issue in this case —*viz.*, the constitutionality of the Feinberg Law as it relates to State University—by dragging in every law that has ever been enacted in the State of New York relating to subversive activity, labeling them a "statutory complex" and then seeking to avoid the decision of the *Adler* case upon the basis of speculation and facts which do not exist in this case. It should be noted that the laws which appellants now claim to comprise this "statutory complex" are not new. They were on the books in substantially the same form when *Adler* was decided. They were as irrelevant to that inquiry as they are now. Those statutes are as follows:

Education Law § 3021. This section relates to "removal of superintendents, teachers and employees for treasonable or seditious acts or utterances." We are not presently concerned with the removal of anyone for treasonable or seditious acts or words. Furthermore, by its specific terms, it applies only to a person employed as a "superintendent of schools, teacher or employee in the public schools, in any city or school

district of the state * * *." It does not apply to State University or to the facts of the present case.

Civil Service Law § 105, subd. 3. This subdivision relates to the removal of persons in the civil service for treasonable or seditious acts or words. It is derived from Civil Service Law § 23-a which was part of the law of New York State at the time of the *Adler* decision. Education Law § 3022 (the Feinberg Law), however, never referred to § 23-a and does not now. Moreover, it does not refer to § 105. It continues to refer, as it did at the time of *Adler* only to "section twelve-a". Thus, we are not now concerned with Civil Service Law § 105, subd. 3 (former § 23-a) which, as pointed out, deals with the removal of public employees for treasonable or seditious acts or words, any more than we were at the time of the *Adler* decision. We are dealing only with the failure of college-level personnel to qualify for appointment under the Feinberg Law and the procedures established thereunder for the implementation of Civil Service Law § 12-a (now § 105, subds. 1 and 2).

*Penal Law §§ 160 and 161.** These sections, referred to in Civil Service Law § 105, subd. 3, deal with

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* Civil Service Law § 105, subd. 3, refers to the Penal Law for its definitions of sedition and treason. Chapter 1030 of the Laws of 1965, effective September 1, 1967, repealed Penal Law §§ 160 and 161 and substituted the following section:

"§ 240.15 *Criminal anarchy.*

A person is guilty of criminal anarchy when (a) he advocates the overthrow of the existing form of government of this state by violence, or (b) with knowledge of its contents, he publishes, sells or distributes any document which advocates such violent overthrow, or (c) with knowledge of its purpose, he becomes a member of any organization which advocates such violent overthrow. Criminal anarchy is a class E felony."

This same chapter 1030 repealed Penal Law § 2380 which defines treason.

the crime of criminal anarchy and prosecution therefor. No one here has been charged with criminal anarchy and these sections have nothing to do with our inquiry. This Court—refusing, as it does, to adjudicate speculative and abstract issues—should abstain from passing on the constitutionality of these sections until an actual controversy involving the application of Civil Service Law § 105, subd. 3, and based upon an interpretation thereof by the State's courts, is presented for determination. Particularly in view of the amendment to these sections which becomes effective on September 1, 1967 (L. 1965, ch. 1030).

We come then to the crux of our inquiry, *viz.*, a challenge to Education Law § 3022 as it implements Civil Service Law § 105, subds. 1 and 2. No other statutes are involved. A careful study of these sections reveals that we are here concerned with substantially the same provisions of law as were upheld in *Adler* except they are now being applied to the college-level personnel. The only other change is the addition of the final sentence to section 105, subd. 1 (c), which appellants claim is a bill of attainder and will be discussed in full in Point II of this brief.

Turning then to the *Adler* case, we find that this Court characterized that action as one for declaratory judgment that Civil Service Law § 12-a (now § 105, subds. 1 and 2), as implemented by the Feinberg Law, be declared unconstitutional (342 U. S. 485, at p. 491)—exactly the same problem with which we are now faced.

In the *Adler* case, this Court rejected the argument, which is also made here, that the Feinberg Law and the Rules promulgated thereunder "constitute an abridgement of freedom of speech and assembly of persons employed or seeking employment", stating (pp. 492, 493):

"It is clear that such persons have the right under our law to assemble, speak, think and believe as they will. *Communications Assn.* v. *Douds,* 339 U. S. 382. It is equally clear that they have no right to work for the State in the school system on their own terms. *United Public Workers* v. *Mitchell,* 330 U. S. 75. They may work for the school system upon the reasonable terms laid down by the proper authorities of New York. If they do not choose to work on such terms, they are at liberty to retain their beliefs and associations and go elsewhere. Has the State thus deprived them of any right to free speech or assembly? We think not. Such persons are or may be denied, under the statutes in question, the privilege of working for the school system of the State of New York because, first, of their advocacy of the overthrow of the government by force or violence, or, secondly, by unexplained membership in an organization found by the school authorities, after notice and hearing, to teach and advocate the overthrow of the government by force or violence, and known by such persons to have such purpose. * * *

"If, under the procedure set up in the New York law, a person is found to be unfit and is disqualified from employment in the public school system because of membership in a listed organization, he is not thereby denied the right of free speech and assembly. His freedom of choice between membership in the organization and employment in the school system might be limited, but not his freedom of speech or assembly, except in the remote sense that limitation is inherent in every choice. Certainly such limitation is not one the state may not make in the exercise of its police power to protect the schools from pollution and thereby to defend its own existence."

Equally without merit is appellants' assertion that the provisions of § 3022 of the Education Law and § 105(1)(c) of the Civil Service Law, which make membership in the Communist Party *prima facie* evidence of disqualification for state employment, are contrary to procedural due process. The same argument was before this Court in *Adler* and was decisively rejected (pp. 494-496):

"Membership in a listed organization found to be within the statute and known by the member to be within the statute is a legislative finding that the member by his membership supports the thing the organization stands for, namely, the overthrow of government by unlawful means. We cannot say that such a finding is contrary to fact or that 'generality of experience' points to a different conclusion. Disqualification follows therefore as a reasonable presumption from such membership and support. Nor is there here a problem of procedural due process. The presumption is not conclusive but arises only in a hearing where the person against whom it may arise has full opportunity to rebut it. The holding of the Court of Appeals below is significant in this regard.

'The statute also makes it clear that * * * proof of such membership "shall constitute *prima facie* evidence of disqualification" for such employment. But, as was said in *Potts* v. *Pardee* (220 N. Y. 431, 433): "The presumption growing out of a *prima facie* case * * * remains only so long as there is no substantial evidence to the contrary. When that is offered the presumption disappears, and unless met by further proof there is nothing to justify a finding based solely upon it." Thus the phrase "*prima facie* evidence of disqualification," as used in the statute, imports a hearing at which one who seeks appointment to or retention in a public school position shall be afforded an opportunity to present substantial evidence contrary to the presumption sanctioned by the *prima facie* evidence for which subdivision 2 of section 3022 makes provision. Once such contrary evidence has been received, however, the official who made the order of ineligibility has thereafter the burden of sustaining the validity of that order by a fair preponderance of the evidence. (Civil Service Law, § 12-a, subd. [d].) Should an order of ineligibility then issue, the party aggrieved thereby may avail himself of the provisions for review prescribed by the section of the statute last cited above. In that view there here arises no question of procedural due process.' 301 N. Y. 476, at p. 494, 95 N. E. 2d 806, 814-815.

> "Where, as here, the relation between the fact found and the presumption is clear and direct and is not conclusive, the requirements of due process are satisfied."

In accordance with its well established principle, this Court in *Adler* accepted the construction by the highest court of New York as to the procedural due process provided by the Feinberg Law (*Cf. Seagram, et al.* v. *Hostetter,* 384 U. S. 35 [1966]; *NAACP* v. *Button,* 371 U. S. 415 [1963]). That construction, of course, stands as the three-judge Court below stated.

The recent decision of this Court in *Elfbrandt* v. *Russell,* 384 U. S. 11 (1966), is not to the contrary. In that case this Court struck down an oath and accompanying statutory gloss which automatically subjected to immediate dismissal and criminal penalties any state employee who knowingly became a member of an organization which had as one of its purposes the violent overthrow of the government. The Court held that a "law which applies to membership without the 'specific intent' to further the illegal aims of the organization infringes unnecessarily on protected freedoms."

Such is not the case here. The whole thrust of the Feinberg Law, as construed by the New York courts and this Court, is premised upon knowing advocacy with the final burden of proof thereof resting with the employer.

Fourteen years have passed since the Feinberg Law was upheld by this Court—fourteen years of practical application by those who administer it. In those fourteen years there has been no instance of due process having been denied under it, no instance of its application or use to curb innocent activity, belief or speech, as appellants contend it will do.

This is the simple demonstration that the Feinberg Law is what this Court and the Court of Appeals of New York in *Adler* said it is and does, not what appellants here theorize it might do.

c. Education Law § 3022 and Civil Service Law § 105, subds. 1 and 2 are not invalid for vagueness.

There is no merit to appellants' contention that the language of the challenged sections is so vague that it tends to deter legitimate expression of ideas and requires a teacher to act at his peril because proscribed acts are not clearly defined.

Section 105(1) of the Civil Service Law clearly lists three causes for ineligibility for employment in the state civil service, *viz.* wilfully advocating, advising or teaching the doctrine of violent overthrow of government; publishing, editing, or selling any printed matter containing such a doctrine, while advocating the necessity or propriety of adopting the doctrine; and organizing or becoming a member of a group of persons advocating such a doctrine. Similarly, subdivision 2 of § 3022 of the Education Law is directed at persons or organizations which "advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or political subdivision thereof shall be overthrown * * * by force."

Analyzing the language of these statutes, Judge MOORE, writing for the three-judge Court which decided this case below, stated (pp. 292-293):

> "Legitimate activities are not deterred by these sections of the statutes. Not teaching Communist theory in a course in economic or political history; only teaching that government shall or should 'be overthrown * * * by force' is a basis for adverse consequences under these sections. Not innocent membership in the Communist Party; in contrast to what could

have been deterred by the oath struck down in *Wieman* v. *Updegraff*, 344 U. S. 183, 73 S. Ct. 215, 97 L. Ed. 216 (1952); only knowing membership in an organization advocating the violent overthrow of government is grounds for ineligibility for state employment. *Lederman* v. *Board of Education*, 276 App. Div. 527, 530, 96 N. Y. S. 2d 466, 470 (2d Dept. 1950), aff'd *sub nom. Thompson* v. *Wallin*, 301 N. Y. 476, 95 N. E. 2d 806 (1950), aff'd *sub nom. Adler* v. *Board of Education*, 342 U. S. 485, 72 S. Ct. 380 (1952); see also *Adler* v. *Wilson*, 282 App. Div. 418, 123 N. Y. S. 2d 655 (3rd Dept., 1953).

"Nor do these sections deter all distribution of Communist propaganda, or the editing of Communist literature. Under Section 105(1)(b), a distributor or editor of subversive literature must also advocate or embrace the 'duty, necessity, or propriety' of adopting the doctrine of violent overthrow, before he can be disqualified from state employment."

Directing itself to the same argument—that the statute was vague and indefinite—the Supreme Court in the *Adler* case said (p. 496):

"It is also suggested that the use of the word 'subversive' is vague and indefinite. But the word is first used in § 1 of the Feinberg Law, which is the preamble to the Act, and not in a definitive part thereof. When used in subdivision 2 of § 3022, the word has a very definite meaning, namely, an organization that teaches and advocates the overthrow of government by force or violence."

The cases of *Baggett* v. *Bullitt*, 377 U. S. 360 (1964) and *Cramp* v. *Board of Public Instruction*, 368 U. S. 278 (1961), relied upon by the appellants here, affirmed rather than repudiated the principles of the *Adler* decision. Although both of these cases involved oaths which this Court found to be too vague, it is significant that in both opinions, this Court contrasted such oaths with the clearly stated grounds for disqualification for employment under the Feinberg Law.

In the *Cramp* case this Court said (p. 286):

> "The provision of the oath here in question, it is to be noted, *says nothing of advocacy of violent overthrow of state or federal government.* It *says nothing of membership or affiliation with the Communist Party, past or present.* The provision is completely lacking in these or any other terms susceptible of *objective measure.* * * *" (Italics ours.)

In *Baggett* this Court said (p. 370) the "Washington oath *goes beyond overthrow or alteration by force or violence.*" (Italics ours.) That is one of the criteria of the Feinberg Law, which was upheld in *Adler.*

This Court, at the conclusion of the *Baggett* opinion, declared (p. 372):

> "As in *Cramp* v. *Board of Public Instruction, supra,* we do not question the power of a State to take proper measures safeguarding the public service from disloyal conduct."

The sole issue in the *Baggett* case was whether the language of the two oaths, one of which applied to teachers only and the other to public employees generally, was so vague that the person taking it could not know what conduct he was foreswearing. With respect to that, the Court posed the question whether the language of the oath applied to endorsement or support for Communist candidates for office; to a lawyer who has represented the Communist Party or its members; or to a journalist who has defended the constitutional rights of the Communist Party or its members (p. 368). The Court specifically pointed out that the oath was not limited to urging the overthrow of the government "by force or violence" (*supra*).

The teachers' oath was deemed vague because it exacted an oath that by "precept and example" the affiant would "promote respect for the flag and the institutions of the United States and the State of Washington". This Court listed some eight activities which could be deemed inconsistent with this promise (pp. 369-370). There is, of course, nothing of that sort in the New York statutes or Regents' Rules.

The whole thrust of the *Baggett* opinion is the "vague", the "indefinite", the "uncertain meanings" of the oaths required by the Washington statute.

Similarly, the *Cramp* case, which this Court in *Baggett* treated as precedent for its ruling, involved a Florida statute which required an oath by every state employee that he has not and will not "lend aid, support, advice, counsel or influence to the Communist Party" (368 U. S., at p. 279) —a requirement completely different from the New York statutes or Regents Rules.

In validating the statutes in the *Baggett* and *Cramp* cases, this Court cited the *Adler* case and reaffirmed the principle that a State may take proper measures to safeguard the public service from disloyal conduct and may even require an oath if that oath is clear and definite and directed to foreswearing the overthrow or alteration of the government "by force or violence". The only mention of the *Adler* case in those two opinions was for the purpose of distinguishing it from such cases and reaffirming the principles upon which it was based.

POINT II

The statutes are not a bill of attainder.*

Appellants argue that Education Law § 3022 and Civil Service Law § 105, subd. 1(c), constitute a bill of attainder in that they single out as ineligible for employment in State schools members of the Communist Party of New York and of the Communist Party of the United States.

In support of their position, appellants rely upon *United States* v. *Brown,* 381 U. S. 437 (1965), where a statute was held unconstitutional as a bill of attainder which made it a crime for a "person who is or has been a member of the Communist Party" to serve as an officer or employee of a labor union (except certain clerical or custodial positions) within five years of the termination of such membership.

The distinction between the statute in the *Brown* case and the present case is self-evident. The statutes here involved do not legislatively disqualify a person from government service for membership in the Communist Party, past or present. There is no automatic legislative determination of disqualification.

Education Law § 3022 leaves it to administrative determination, after notice and hearing, to list the organizations which come within the statutory definition. It makes membership in such organizations only *prima facie* evidence of disqualification. Membership may be severed in good faith; membership may be explained. Furthermore, it was only after extensive hearings that the Board of Regents listed two organizations under § 3022, *viz.,* the Communist Party of New York and the Communist Party of the United States, and its determination was subject to

* This argument was also made and rejected in the *Adler* case.

judicial review (*Thompson* v. *Wallin*, 301 N. Y. 476, aff'd *sub. nom. Adler* v. *Board of Education*, 342 U. S. 485).

Similarly, Civil Service Law § 105, subd. 1(c) does not automatically disqualify a teacher as the result of a "legislative trial". It creates only a *prima facie* presumption of disqualification which is subject to rebuttal. Moreover, this presumption was not based upon an original determination by the Legislature as to the aims of the Communist Party but was based upon the Regents' findings made pursuant to Section 3022 (L. 1958, ch. 503, sec. 1).

This is altogether different from the statute in the *Brown* case, and the procedure followed here was not condemned therein. The majority opinion in that case distinctly declared that it was "not holding" that "subversives must be permitted to hold sensitive government positions."

Where, as here, we have no automatic disqualification as the result of a legislative trial, the statutes do not constitute a bill of attainder (*Communist Party of the United States* v. *Subversive Activities Control Board*, 367 U. S. 1 [1961]).

CONCLUSION

The judgment appealed from should be affirmed.

October 25, 1966.

Respectfully submitted,

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APPENDIX

STATUTES INVOLVED
and
RULES OF THE BOARD OF REGENTS

Civil Service Law

§ 105.[1] *Subversive activities; disqualification.* 1. Ineligibility of persons advocating overthrow of government by force or unlawful means. No person shall be appointed to any office or position in the service of the state or of any civil division thereof, nor shall any person employed in any such office or position be continued in such employment, nor shall any person be employed in the public service as superintendent, principal or teacher in a public school or academy or in a state college or any other state educational institution who:

(a) by word of mouth or writing wilfully and deliberately advocates, advises or teaches the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown or overturned by force, violence or any unlawful means; or

(b) prints, publishes, edits, issues or sells, any book, paper, document or written or printed matter in any form, containing or advocating, advising or teaching the doctrine that the government of the United States or of any state or of any political subdivision thereof should be overthrown by force, violence or any unlawful means, and who advocates, advises, teaches, or embraces the duty, necessity or propriety of adopting the doctrine contained therein; or

(c) organizes or helps to organize or becomes a member of any society or group of persons which teaches or advo-

[1] Subdivisions 1 and 2 formerly § 12-a, renumbered L. 1958, ch. 790. Subdivision 3 formerly § 23-a, renumbered L. 1958, ch. 790.

cates that the government of the United States or of any state or of any political subdivision thereof shall be overthrown by force or violence, or by any unlawful means.

For the purposes of this section, membership in the communist party of the United States of America or the communist party of the state of New York shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the service of the state or of any city or civil division of thereof.

2. A person dismissed or declared ineligible pursuant to his position with pay for the period of such suspension or declaration of ineligibility be entitled to petition for an order to show cause signed by a justice of the supreme court, why a hearing on such charges should not be had. Until the final judgment on said hearing is entered, the order to show cause shall stay the effect of any order of dismissal or ineligibility based on the provisions of this section; provided, however, that during such stay a person so dismissed shall be suspended without pay, and if the final determination shall be in his favor he shall be restored to his position with pay for the period of such suspension less the amount of compensation which he may have earned in any other employment or occupation and any unemployment insurance benefits he may have received during such period. The hearing shall consist of the taking of testimony in open court with opportunity for cross examination. The burden of sustaining the validity of the order of dismissal or ineligibility by a fair preponderance of the credible evidence shall be upon the person making such dismissal or order of ineligibility.

3. Removal for treasonable or seditious acts or utterances. A person in the civil service of the state or of any civil division thereof shall be removable therefrom for the

utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position. For the purpose of this subdivision, a treasonable word or act shall mean "treason", as defined in the penal law; a seditious word or act shall mean "criminal anarchy" as defined in the penal law.

Laws of 1958, chapter 503

Section 1. Declaration of legislative intent. The legislature takes cognizance that section three thousand twenty-two of the education law makes provision for the implementation and enforcement of section twelve-a of the civil service law with respect to the elimination of subversive persons from the public school system; that such section three thousand twenty-two authorizes the board of regents, after notice and hearing, to list "organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a of the civil service law"; that the board of regents, after notice and hearing, has so listed the communist party of the United States of America and the communist party of the state of New York; and that pursuant to such section three thousand twenty-two and rules and regulations adopted thereunder membership in either such organization constitutes *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state. It is the intent of the legislature to apply to all officers and employees subject to section twelve-a of the civil service law the same provision that

membership in either of such organizations shall constitute *prima facie* evidence of disqualification for appointment or continued employment.

Education Law

§ 3021. *Removal of superintendents, teachers and employees for treasonable or seditious acts or utterances.* A person employed as superintendent of schools, teacher or employee in the public schools, in any city or school district of the state, shall be removed from such position for the utterance of any treasonable or seditious word or words or the doing of any treasonable or seditious act or acts while holding such position.

§ 3022. *Elimination of subversive persons from the public school system.* 1. The board of regents shall adopt, promulgate, and enforce rules and regulations for the disqualification or removal of superintendents of schools, teachers or employees in the public schools in any city or school district of the state and the faculty members and all other personnel and employees of any college or other institution of higher education owned and operated by the state or any subdivision thereof who violate the provisions of sections three thousand twenty-one of this article or who are ineligible for appointment to or retention in any office or position in such public schools or such institutions of higher education on any of the grounds set forth in section twelve-a[2] of the civil service law and shall provide therein appropriate methods and procedure for the enforcement of such sections of this article and the civil service law.

2. The board of regents shall, after inquiry, and after such notice and hearing as may be appropriate, make a

[2] Now section 105, subds. 1 and 2.

listing of organizations which it finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the government of the United States or of any state or of any political subdivision thereof shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section twelve-a[3] of the civil service law. Such listings may be amended and revised from time to time. The board, in making such inquiry, may utilize any similar listings or designations promulgated by any federal agency or authority authorized by federal law, regulation or executive order, and for the purposes of such inquiry, the board may request and receive from such federal agencies or authorities any supporting material or evidence that may be made available to it. The board of regents shall provide in the rules and regulations required by subdivision one hereof that membership in any such organization included in such listing made by it shall constitute *prima facie* evidence of disqualification for appointment to or retention in any office or position in the public schools of the state.

3. The board of regents shall annually, on or before the fifteenth day of February, by separate report, render to the legislature, a full statement of measures taken by it for the enforcement of such provisions of law and to require compliance therewith. Such reports shall contain a description of surveys made by the board of regents, from time to time, as may be appropriate, to ascertain the extent to which such provisions of law have been enforced in the city and school districts of the state.

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[3] Now section 105, subds. 1 and 2.

Rules of the Board of Regents
(Adopted July 15, 1949)

Article XVIII

Subversive Activities

Section 244. *Disqualification or removal of superintendents, teachers and other employes.*

1. The school authorities of each school district shall take all necessary action to put into effect the following procedures for disqualification or removal of superintendents, teachers or other employes who violate the provisions of section 3021 of the Education Law or section 12-a[4] of the Civil Service Law.

a. Prior to the appointment of any superintendent, teacher or employe, the nominating official, in addition to making due inquiry as to the candidate's academic record, professional training, experience and personal qualities, shall inquire of prior employers, and such other persons as may be in a position to furnish pertinent information, as to whether the candidate is known to have violated the aforesaid statutory provisions, including the provisions with respect to membership in organizations listed by the Board of Regents as subversive in accordance with paragraph 2 hereof. No person who is found to have violated the said statutory provisions shall be eligible for employment.

b. The school authorities shall require one or more of the officials in their employ, whom they shall designate for such purpose, to submit to them in writing not later than October 31, 1949, and not later than September 30th of

[4] Now section 105.

each school year thereafter, a report on each teacher or other employe. Such report shall either (1) state that there is no evidence indicating that such teacher or other employe has violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive in accordance with paragraph 2 hereof; or (2) where there is evidence indicating a violation of said statutory provisions, including membership in such a subversive organization, recommend that action be taken to dismiss such teacher or other employe, on the ground of a specified violation or violations of the law.

c. The school authorities shall themselves prepare such reports on the superintendent of schools and such other officials as may be directly responsible to them, including the officials designated by them in accordance with subdivision b of this paragraph.

d. The school authorities shall proceed as promptly as possible, and in any event within 90 days after the submission of the recommendations required in subdivision b of this paragraph, either to prefer formal charges against superintendents, teachers or other employes for whom the evidence justified such action, or to reject the recommendations for such action.

e. Following the determination required in subdivision d of this paragraph, the school authorities shall immediately institute proceedings for the dismissal of superintendents, teachers or other employes in those cases in which in their judgment the evidence indicates violation of the statutory provisions herein referred to. In proceedings against persons serving on probation or those having tenure, the appropriate statutory procedure for dismissal shall be followed. In proceedings against persons serving

under contract and not under the provisions of a tenure law, the school authorities shall conduct such hearings on charges as they deem the exigencies warrant, before taking final action on dismissal. In all cases all rights to a fair trial, representation by counsel and appeal or court review as provided by statute or the Constitution shall be scrupulously observed.

2. Pursuant to chapter 360 of the Laws of 1949, the Board of Regents will issue a list, which may be amended and revised from time to time, of organizations which the Board finds to be subversive in that they advocate, advise, teach or embrace the doctrine that the Government of the United States, or of any state or of any political subdivision thereof, shall be overthrown or overturned by force, violence or any unlawful means, or that they advocate, advise, teach or embrace the duty, necessity or propriety of adopting any such doctrine, as set forth in section 12a[5] of the Civil Service Law. Evidence of membership in any organization so listed on or after the tenth day subsequent to the date of official promulgation of such list shall constitute *prima facie* evidence of disqualification for appointment to or retention of any office or position in the school system. Evidence of membership in such an organization prior to said day shall be presumptive evidence that membership has continued, in the absence of a showing that such membership has been terminated in good faith.

3. On or before the first day of December of each year, the school authorities of each school district shall render to the Commissioner of Education a full report, officially adopted by the school authorities and signed by their presiding officer, of the measures taken by them for the enforcement of these regulations during the calendar year

[5] Now section 105, subds. 1 and 2.

ending on the 31st day of October preceding. Such report shall include a statement as to (a) the total number of superintendents, teachers and other employes in the employ of the school district; (b) the number of superintendents, teachers and other employes as to whom the school authorities and/or the officials designated by them have reported that there is no evidence indicating that such employes have violated the statutory provisions herein referred to, including the provisions with respect to membership in organizations listed by the Regents as subversive; and (c) the number of superintendents, teachers and other employes in whose cases the school authorities and/or the officials designated by them have recommended that action be taken to dismiss the employes in question, on the grounds of specified violations of the law or evidence of membership in a subversive organization. Such report shall also include, for the group listed under (c) above, a statement of (d) the number of cases in which charges have been or are to be preferred and the status or final disposition of each of these cases; (e) the number of cases in which the school authorities have concluded that the evidence reported by the designated officials does not warrant the preferring of charges; and (f) the number of cases in which the school authorities have not determined, as of October 31st of the school year in question, on the action to be taken.

4. Immediately upon the finding by school authorities that any person is disqualified for appointment or retention in employment under these regulations, said school authorities shall report to the Commissioner of Education the name of such person and the evidence supporting his disqualification, including a transcript of the official records of hearings on charges, if any, which have been conducted.